See Teow Chuan & Anor v YAM Tunku Nadzaruddin Ibni Tuanku Jaafar & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B–02–185 OF 2004
GOPAL SRI RAM, ZULKEFLI AND RAUS SHARIF JJCA
18 DECEMBER 2006

Companies and Corporations — Resolutions — Legal effect — Board resolution requiring the executive directors to retire upon attaining 55 years of age — Whether resolution passed for an improper purpose

Contract — Specific performance — Injunction — Granting of a declaration — Whether such a declaration would amount to granting specific enforcement of a service contract

The fifth defendant was a public listed company. The other defendants were members of the fifth defendant's board of directors. The plaintiffs were brothers and were at all material times directors of the fifth defendant. The first plaintiff rose from the ranks to become a managing director of the fifth defendant. But he had never had a contract of service with the fifth defendant. As for the second plaintiff, he was an executive director and never had a contract of service with the fifth defendant. The present dispute manifested itself in consequence of a decision of the board of the fifth defendant taken on 31 March 1999 resolving that all executive directors must retire on attaining 55 years of age. The plaintiffs brought an action challenging the introduction of a new term into their existing contract that they should retire. The High Court dismissed the claim of both plaintiffs. They appealed. The main point in the case was whether the fifth defendant by its board of resolution of 31 March 1999 could require the first plaintiff to retire on the ground that he had already attained 55 years of age; an event that took place some three years earlier.

Held, allowing the appeal:

(1) There is material on record to reasonably support the inference that the resolution of 31 March 1999 was the product of a design by the second defendant and those members of the board aligned to him to have the plaintiffs removed as managing director and executive director respectively. The power to pass the resolution as to retirement of directors was a fiduciary power entrusted by the memorandum and articles of the fifth defendant to the other defendants. That power was used by the defendants for a collateral or improper purpose, namely, to remove the first plaintiff and was to that extent invalid (see para 6).

(2) In common law, an attempt by a party to a contract to unilaterally introduce a new term into it is regarded as a breach of contract. This is because it

amounts to 'an intimation of an intention to abandon and altogether to refuse performance of the contract' as it stands (see *Freeth v Burr* LR 9 CP 213). The learned judge in the court below ought to have held for the plaintiffs by making a finding that so much of the resolution of 31 March 1999 resolving that all executive directors must retire on attaining 55 years of age did not apply to the plaintiffs (see para 8).

(3) An injunction restraining the implementation of the resolution of 31 March 1999 imposing a retirement age of 55 years upon the plaintiffs is not a decree of specific enforcement. It merely prevents so much of that resolution which requires executive directors to retire upon attaining 55 years of age from being applied to the plaintiffs. This is not a case of termination or removal from office under s 128 of the Companies Act 1965. This is a case in which a retirement age is being imposed by way of a board resolution. There is a world of difference between retirement from office and termination from employment (see para16).

(4) The Human Resource package introduced by the defendants by way of the same resolution of 31 March 1999 allows the executive director who is presently enjoying benefits better than that in the terms & conditions of employment, to continue to enjoy such benefits. Therefore the plaintiffs are entitled to continue as managing director and executive director respectively without a retirement age and are entitled to continue to enjoy the said benefit until they attain 70 years of age. This does not amount to the specific enforcement of a service contract. This is because they merely require the defendants to adhere to that part of the board resolution that introduced the human resource package (see para 19).

[Bahasa Malaysia summary

Defendan kelima adalah sebuah syarikat awam yang disenaraikan. Defendan-defendan yang lain adalah ahli lembaga pengarah defendan kelima. Plaintif-plaintif adalah adik-beradik dan telah pada setiap masa yang material pengarah defendan kelima. Plaintif pertama telah menaikkan pangkat sampai ke pengarah urusan. Tetapi beliau tidak pernah mempunyai satu kontrak perkhidmatan dengan defendan kelima. Plaintif kedua pula merupakan seorang pengarah eksekutif dan tidak pernah mempunyai satu kontrak perkhidmatan dengan defendan kelima. Pertikaian ini berlaku akibat keputusan lembaga defendan kelima bertarikh 31 Mac 1999 yang memutuskan bahawa semua pengarah-pengarah eksekutif mesti bersara apabila mencapai umur 55 tahun. Plaintif-plaintif mengambil tindakan ini mencabar pengenalan terma baru ke dalam kontrak yang sedia ada bahawa mereka harus bersara. Mahkamah tinggi menolak tuntutan kedua-dua plaintif. Mereka merayu. Perkara utama dalam kes ini ialah sama ada defendan kelima melalui resolusi lembaganya bertarikh 31 Mac 1999 dapat menghendaki plaintif pertama bersara atas alasan bahawa beliau telah mencapai umur 55 tahun; satu kejadian yang berlaku tiga tahun sebelum ini.

Diputuskan, membenarkan rayuan tersebut: A

(1) Terdapat material atas rekod yang menyokong dengan munasabahnya inferens bahawa resolusi bertarikh 31 Mac 1999 adalah produk defendan kedua serta ahli-ahli lembaga yang memihak kepadanya yang bertujuan menyingkirkan plaintif-plaintif sebagai pengarah urusan dan pengarah eksekutif masing-masing. Kuasa untuk meluluskan resolusi tersebut berhubungan dengan persaraan pengarah-pengarah adalah kuasa fidusiari yang diamanahkan oleh memorandum dan perkara-perkara defendan kelima kepada defendan-defendan yang lain. Kuasa tersebut digunakan oleh defendan-defendan untuk tujuan kolateral atau yang tidak patut, iaitu, menyingkirkan plaintif pertama dan setakat itu adalah tidak sah (lihat perenggan 6). B C

(2) Dalam common law, percubaan oleh satu pihak kepada satu kontrak secara unilateral mengenalkan terma baru kepadanya adalah dianggap sebagai kemungkiran kontrak. Ini adalah kerana ia merupakan 'satu pemakluman niat untuk menggugurkan dan enggan sama sekali melaksanakan kontrak tersebut' seperti yang sedia ada (lihat *Freeth v Burr* LR 9 CP 213). Hakim yang bijaksana di mahkamah bawah sepatutnya memutuskan bagi pihak plaintif-plaintif dengan memutuskan bahawa setakat mana resolusi bertarikh 31 Mac 1999 yang menyatakan bahawa pengarah-pengarah eksekutif harus bersara apabila mencapai umur 55 tahun tidak terpakai kepada plaintif-plaintif (lihat perenggan 8). D E

(3) Satu injunksi menyekat pelaksanaan resolusi bertarikh 31 Mac 1999 yang mengenakan umur bersara pada 55 tahun ke atas plaintif-plaintif bukannya satu dekri pelaksanaan spesifik. Ia hanya menghalang setakat mana resolusi yang menghendaki pengarah-pengarah eksekutif bersara apabila mencapai umur 55 tahun daripada terpakai kepada plaintif-plaintif. Ini bukannya satu kes penamatan atau penyingkiran dari jawatan di bawah s 128 Akta Syarikat 1965. Ini adalah satu kes dimana umur bersara telah dikenakan melalui satu resolusi lembaga. Terdapat perbezaan yang ketara di antara bersara daripada jawatan dan penamatan pekerjaan (lihat perenggan 16). F G

(4) Satu injunksi menyekat pelaksanaan resolusi bertarikh 31 Mac 1999 yang mengenakan umur bersara pada 55 tahun ke atas plaintif-plaintif bukannya satu dekri pelaksanaan spesifik. Ia hanya menghalang setakat mana resolusi yang menghendaki pengarah-pengarah eksekutif bersara apabila mencapai umur 55 tahun daripada terpakai kepada plaintif-plaintif. Ini bukannya satu kes penamatan atau penyingkiran dari jawatan di bawah s 128 Akta Syarikat 1965. Ini adalah satu kes dimana umur bersara telah dikenakan melalui satu resolusi lembaga. Terdapat perbezaan yang ketara di antara bersara daripada jawatan dan penamatan pekerjaan (lihat perenggan 19).] H I

Notes

For cases on injunction, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 4496. For cases on legal effect, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 640.

Cases referred to

Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] AC 1 (refd)
Francis v Municipal Councillors of Kuala Lumpur [1962] MLJ 407 (refd)
Gregory v Philip Morris Ltd [1988] 80 ALR 455 (refd)
Guest, Keen, Williams Private Ltd v PJ Sterling AIR [1959] SC 1279 (refd)
Howard Smith Ltd v Ampol Petroleum Ltd & Ors [1974] AC 821 (refd)
Ngurli Ltd v McCann [1953] 90 CLR 425 (refd)
Ram Kissendas v Satya Charan AIR [1950] PC 81 (refd)
Saroj Kumar Ghosh v Chairman, Orissa State Electricity Board AIR [1970] Ori 126 (refd)
Workmen of Kettlewell Bullen & Co Ltd v Kettlewell Bullen & Co [1964] LLJ 146 (refd)

Legislation referred to

Specific Relief Act 1950 s 21(1)

Appeal from: Suit No MT3–22–524 of 1999 (High Court, Shah Alam)

VK Lingam (VK Lakshmi with him) (VK Lingam & Co) for the appellants.
Romesh Abraham (Audrey Tang with him) (Shook Lin & Bok) for the respondents.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This appeal is directed against the order of the Shah Alam High Court dismissing the plaintiffs' claim against the defendants for specific relief amounting to reinstatement in office. The factual matrix from which this dispute arises lies in a narrow compass. We begin by introducing the parties in this case.

[2] The fifth defendant is a public listed company. The other defendants are members of the fifth defendant's board of directors. The plaintiffs are brothers. They were at all material times directors of the fifth defendant. The first plaintiff rose from the ranks to become a director of the fifth defendant. Initially, he was an employee of the fifth defendant's branch office at Ipoh. He became a director on 30 October 1966 and then was appointed as the fifth defendant's very first managing director on 18 December 1967 by a resolution of that date. He has held that post ever since. But he has never had a contract of service with the fifth defendant. Apart from being a member of the fifth defendant's board, the first plaintiff is its substantial shareholder. He either directly or indirectly owns almost 68 million shares of the fifth defendant. As for the second plaintiff, he joined the fifth defendant in 1967, was appointed as a member of its board on 8 October 1974 and was at all material times its executive director. Like the first plaintiff, he never had a contract of service with the fifth defendant. And, he too is a substantial shareholder of the fifth defendant and owns or controls almost 65 million of its shares.

[3] There are three features of the plaintiffs' respective service contracts with the fifth defendant that require mention. First, neither was in writing. Second, neither contained an express term imposing a retirement age for the plaintiffs. Third, there

is no article in the memorandum and articles of association of the fifth defendant specifying a retirement age for either plaintiff. Neither is there any material from which an inference may fairly be drawn of the existence of an implied term that the plaintiffs, in particular the first plaintiff, was compulsorily to retire when he reached 55 years of age. In fact the evidence of circumstances points in the opposite direction. For, when the first plaintiff reached the age of 55 on 5 January 1996, he was not called upon to retire. On the other hand, he simply continued in his position as the fifth defendant's managing director. There is therefore much force in the first plaintiff's argument and this forms part of his pleaded case that it was a term of the agreement between himself and the fifth defendant that the former would serve as the managing director of the latter for as long as he is willing and able to perform his duties. The second plaintiff's position is more or less the same as that of the first. In his case he had served the fifth defendant for about 30 years with no suggestion that he should retire as an executive director on attaining 55 years of age. He was therefore entitled to assert, as he did, that he could act as an executive director for so long as he was willing and able to do so.

[4] The present dispute manifested itself in consequence of a decision of the board of the fifth defendant taken on 31 March 1999 resolving that all executive directors must retire on attaining 55 years of age. This decision was conveyed to the first plaintiff by a letter dated 26 April 1999 which informed him that he was required to retire as the managing director of the fifth defendant's group of companies with effect from 31 May 1999. The plaintiffs brought an action challenging the introduction of a new term into their existing contract that they should retire. In his pleaded case, the first plaintiff asserted that it was an implied term of his appointment as managing director of the fifth defendant that he would remain as managing director for as long as he was willing and able to do so. The High Court, as we have already said, dismissed the claim of both plaintiffs.

[5] A number of grounds were canvassed before us both in support of and in opposition to the appeal. We find it unnecessary to deal with all of them. The main point in the case is whether the fifth defendant by its board resolution of 31 March 1999 could require the first plaintiff to retire on the ground that he had already attained 55 years of age; an event that took place some three years earlier. We think that this issue should be resolved in the first plaintiff's favour. Our reasons are as follows.

[6] In the first place, as we have already said, it was neither an express nor an implied term of the first plaintiff's contract with the fifth defendant that he shall retire on attaining 55 years of age. In the second place, (again, as we have already observed) on the material presented to the court below it was plainly a term of the first plaintiff's contract that he shall serve as managing director for as long as he is willing and able to perform his duties. That is why he was permitted without any protest from any quarter to continue to serve as managing director even after he had attained 55 years of age. In the third place, there is material on record to reasonably support the inference that the resolution of 31 March 1999 was the product of a design by the second defendant and those members of the board aligned to him to have the plaintiffs removed as managing director and executive director respectively.

Previous attempts to remove the first plaintiff had failed. Hence resort was had to this rather spurious method of getting rid of him: by purporting to retire him. So much of the resolution as was directed at retiring the plaintiffs (in particular the first plaintiff) was therefore tainted with bad faith evidenced by the bitter family feud between the plaintiffs and the second defendant. In short, the power to pass the resolution as to retirement of directors was a fiduciary power entrusted by the memorandum and articles of the fifth defendant to the other defendants. That power was used by the defendants for a collateral or improper purpose, namely, to remove the first plaintiff and was to that extent invalid (see *Howard Smith Ltd v Ampol Petroleum Ltd & Ors* [1974] AC 821; *Ngurli Ltd v McCann* [1953] 90 CLR 425. In the fourth place, the resolution cannot as a matter of law have retrospective effect so as to compel the plaintiffs to retire. In this context, would refer to two authorities. In *Guest, Keen, Williams Private Ltd v PJ Sterling* AIR [1959] SC 1279, an employer had for the first time introduced into its employment scheme a condition of service that its workmen shall retire at 55 years of age. It was held by the Supreme Court of India that the new condition of service could not apply to employees who had been in employment prior to the introduction of the new term. In the course of his judgment, Gajendragadkar J accepted the argument of the affected workmen that it was unfair and unreasonable to apply the new condition as to retirement to them. That, of course, was a case decided by the application of principles of industrial law and equity, hence the use of the phrase 'unfair and unreasonable' in the judgment of the Supreme Court.

[7] In *Workmen of Kettlewell Bullen & Co Ltd v Kettlewell Bullen & Co* [1964] LLJ 146, rules of retirement were introduced by the employer in 1947 and again in 1951. The Supreme Court of India said:

> Our conclusion is that the rules of retirement at 55 framed in 1947 and 1951 do not apply to the prior employees of the company. It is clear that prior to 1947 there was no rule or condition of service as regards the age of retirement and workmen were allowed to continue as long as they remained fit.

[8] But the common law is far stricter than principles of industrial law and equity. An attempt by a party to a contract to unilaterally introduce a new term into it is regarded as a breach of contract. This is because it amounts to 'an intimation of an intention to abandon and altogether to refuse performance of the contract' as it stands (see *Freeth v Burr* LR 9 CP 213 per Lord Coleridge). And this is precisely the case before us. In our judgment, the learned judge in the court below ought to have held for the plaintiffs by making a finding that so much of the resolution of 31 March 1999 resolving that all executive directors must retire on attaining 55 years of age did not apply to the plaintiffs. We do not envisage any difficulty in the grant of an injunction restraining the defendants from implementing the resolution of 31 March 1999 insofar that it imposes the retirement age of 55 years upon the plaintiffs.

[9] There is a further question. Can the plaintiffs continue to serve as the managing director and executive director respectively of the fifth defendant? We think they can. And with no difficulty. In fact, the Human Resource package introduced by the defendants by way of the same resolution of 31 March 1999 provides the answer. This is what it says in cl 26:

> These Terms & Conditions of Employment shall be effective 1st January 1999.
>
> For Executive Directors who were in employment before 1st January 1999, all the benefits embodied in the above Terms & Conditions of Employment are retroactive to the date of their employment in the Kian Joo Can Factory Group.
>
> Where Executive Director who is presently enjoying any benefit which is better than that in this Terms & Conditions of Employment, shall continue to enjoy such benefit as Personal-To-Holder

[10] There you have it. The plaintiffs are executive directors who enjoyed the benefit of not having to retire at 55 years. This is a benefit which is better than that in the terms and conditions of employment which fix the retirement age at 55 years. Accordingly, this is a benefit that is to accrue to the plaintiffs on a personal to holder basis. All that needs to be done is to grant a declaration to the plaintiffs that gives effect to cl 26.

[11] But, says Mr Abraham for the defendants, such a declaration would amount to granting specific enforcement of a service contract which is something a Court of Equity will never decree. With respect we are unable to accept that submission. It is too wide and disregards the element of flexibility that is common to all types of specific relief. Indeed, s 21(1) of the Specific Relief Act 1950recognises this feature of specific enforcement. It says:

> The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant any such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

[12] In *Francis v Municipal Councillors of Kuala Lumpur* [1962] MLJ 407, Lord Morris of Borth-y-Gest stated what we think is the general policy of a Court of Equity towards the enforcement of service contracts (at p 410):

> In their Lordships' view when there has been a purported termination of a contract of service a declaration to the effect that the contract of service still subsists *will rarely be made*. This is a consequence of the general principle of law that the Courts will not grant specific performance of contracts of service. *Special circumstances will be required* before such a declaration is made and *its making will normally be in the discretion of the Court*. (Emphasis added.)

[13] In *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, Lord Hoffmann stated what we apprehend to be the true principle in words to like effect as those that fell from Lord Morris of Borth-y-Gest in *Francis*:

> A decree of specific performance is of course a discretionary remedy and the question for your Lordships is whether the Court of Appeal was entitled to set aside the exercise of the judge's discretion. There are well-established principles which govern the exercise of the discretion but these, like all equitable principles, are flexible and adaptable to achieve the ends of equity, which is, as Lord Selborne L.C. once remarked, to do more perfect and complete justice' than would be the result of leaving the parties to their remedies at common

law; Wilson v Northampton and Banbury Junction Railway Co (1874) LR 9 Ch App 279, 284. Much therefore depends upon the facts of the particular case...

[14] In *Gregory v Philip Morris Ltd* [1988] 80 ALR 455 at pp 481–482, Jenkinson J said:

> In *Francis v Kuala Lumpur* (at 1417 to 1418) the Judicial Committee referred to 'the general principle of law that the courts will not grant specific performance of contracts of service'. *This was not put as a rule of law but the Committee observed that special circumstances will be required before a court exercises its discretion to make such an order.*
>
> ...
>
> The order sought in the present case does not relate to a particular notice of dismissal. It is designed to compel the respondent to restore its previous relationship with the appellant. The order falls into the category which is subject to the general principle referred to in *Francis.* We do not regard that principle as immutable. *We would not wish to give any endorsement to the view that there may never be an order in the nature of specific performance of a contract of employment. But the making of such an order is a matter within the discretion of the court.* (Emphasis added.)

[15] A case analogous to the present instance is *Ram Kissendas v Satva Charan* AIR [1950] PC 81. There, a resolution was passed purporting to remove certain directors from office. The resolution was not in accordance with the constitution and articles of the company. The Privy Council granted a declaration that the removal of the directors was ineffective. Lord Greene who delivered the advice of the Board said:

> The next point also lacks substance. It was that to affirm the continuance in force of the managing agents' appointment amounted to specific enforcement of a contract of personal service and was a violation of s 21(b) of the Specific Relief Act 1877. The effect of the decree appealed against is not, however, of that nature. It merely prevents dismissal of the managing agents or termination of their appointment at the instance of a majority in violation of articles of association of the company which the minority are entitled to have observed. As between the company and the managing agents it certainly does not have the effect of enforcing a contract of personal service.

[16] So too here. An injunction restraining the implementation of the resolution of 31 March 1999 imposing a retirement age of 55 years upon the plaintiffs is not a decree of specific enforcement. It merely prevents so much of that resolution which requires executive directors to retire upon attaining 55 years of age from being applied to the plaintiffs. You must recall that this is not a case of termination or removal from office under s 128 of the Companies Act 1965. This is a case in which a retirement age is being imposed by way of a board resolution. There is a world of difference between retirement from office and termination from employment.

[17] Thus, in *Saroi Kumar Ghosh v Chairman, Orissa State Electricity Board* AIR 1970 Ori 126, KN Misra J when delivering the judgment of the court said:

> Termination and superannuation cannot be equated. The dictionary meanings of the two also do not indicate that there is any similarity in the two processes. The meaning of 'superannuation' as in the dictionary is 'to cause to retire from service on a pension, to

pension off, to become too old for a pension, to reach an age at which one retires from an office', and the meaning of 'termination' is 'cessation, closure, conclusion, the act of bringing a matter to an end'. Superannuation seems to us to be an event which comes more or less in an automatic process. An age is fixed on the reaching of which the holder of an office is required to go out of office. There is no violation in the act. With the lapse of time the event automatically comes. Both the parties, that is, the employer and the employee have notice of the matter long before and it is an event which cannot be arrested by them if the rule is to be followed. On the other hand, termination is a positive act by which one party even against the desire of the other can bring about the end to an employment. In these circumstances the two processes are essentially different and there is hardly any room to equate one with the other.

[18] At the risk of repetition, we would emphasize that what happened here was the unilateral imposition of a retirement age of 55 years by way of a board resolution after the first plaintiff had already crossed that age about three years earlier. The question is this: can that resolution be made to apply to the plaintiffs? And, as we have already said, it cannot. So it is simply a question of disapplying the resolution to the plaintiffs.

[19] Likewise, a declaration that in accordance with cl 26 of the Human Resource Package the plaintiffs are entitled to continue as managing director and executive director respectively without a retirement age and are entitled to continue to enjoy the said benefit on a personal to holder basis until they attain 70 years of age does not amount to the specific enforcement of a service contract. This is because we are merely requiring the defendants to adhere to that part of the board resolution that introduced the Human Resource Package. We would impose the age limit of 70 years as this is a requirement of the Companies Act.

[20] For the reasons already given, the appeal was allowed and the orders of the High Court were set aside. Secondly, an injunction was granted restraining the implementation of so much of the resolution of the board of directors of the fifth defendant dated 31 March 1999 that imposed the retirement age of 55 years upon the plaintiffs. We also granted a declaration that in accordance with cl 26 of the Human Resource Package that the plaintiffs are entitled to continue as managing director and executive director respectively without a retirement age and are entitled to continue to enjoy the said benefit on a personal to holder basis until they attain 70 years of age. The deposit in court was ordered to be refunded to the plaintiffs and the defendants were ordered to bear the costs of this appeal as well as those incurred in the court below.

Appeal allowed.

Reported by Sally Kee